Supreme Court, U.S.
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No. 97-1469

In The

Supreme Court of the United States

October Term, 1997

CSX TRANSPORTATION, INC.,

Petitioner,

vs.

KENNETH McDANIEL,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Tennessee

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Tennessee Supreme Court, in a case arising out of the Federal Employers' Liability Act, erred by assessing the admissibility of expert scientific testimony within the framework of this Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* and Tennessee Rules of Evidence that are themselves consistent with federal law.

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APPENDIX

Appendix A — Initial Brief of Appellant in No. 01-S-01-9605-CV-00095 (Sup. Ct. Tenn.) Dated September 14, 1996 ..... 1a

Respondent, Kenneth McDaniel, respectfully requests that this Court deny the Petition for a Writ of Certiorari seeking review of the Supreme Court of the State of Tennessee's opinion in this case. That opinion is reported at 955 S.W. 2d 257 (Tenn. 1997).

INTRODUCTION

The Petition for Writ of Certiorari that has been filed in this case can not withstand scrutiny pursuant to this Court's rules regarding jurisdiction and *certiorari* review of state court decisions. It is well settled that this Court will only review federal question decisions made by state courts of last resort if, and only if, the state court judgment that is the subject of review is final. There has been no final judgment in respondent's case or any of the four other remaining cases in this litigation. Respondent's case has been remanded to the trial court for further proceedings including a trial on the merits.

In addition, the petition is meritless on its face because it seeks review of a federal question that was not raised in the proceedings below. The failure to preserve the federal question issue for review is fatal to the petition because this Court, according to established precedent, does not ordinarily decide questions that have not been raised or involved in the lower court.

STATEMENT OF THE CASE

A. Factual Background

Petitioner's factual allegations notwithstanding, the decision below now affects only five cases which were filed under the Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.*, against petitioner, CSX Transportation, Inc., ("CSXT") in the Second

Circuit Court for Davidson County, Tennessee, alleging permanent brain injury secondary to work involving chemical solvents at petitioner's diesel engine shops located at Radnor Yard in Nashville, Tennessee[1]. Originally filed separately but consolidated for purposes of discovery, the plaintiffs in the cases were all railroad employees of CSXT who worked during their careers in various capacities servicing locomotive engines and other railroad equipment. The shop where respondent and the remaining four plaintiffs worked was a locomotive repair facility where everything from minor servicing to complete locomotive overhaul was performed.

For the past thirty years and throughout the careers of respondent and the other remaining claimants, the railroad used large amounts of industrial solvents for degreasing operations in the shop. Over time, the solvents have included carbon tetrachloride, 1,1,1 trichloroethane, trichloroethylene, perchloroethylene, and mineral spirits. All of these solvents fall within a chemical family known as organic solvents. Each of these solvents is highly volatile and tends to be heavier than air causing it to accumulate in low lying areas. It has been known in the medical and scientific community since at least the end of the nineteenth century that this group of chemicals is neurotoxic, *i.e.*, can permanently damage the brain and central nervous system (CNS).

The above described solvents were in almost constant use throughout the past thirty years in petitioner's repair shops located in Nashville, Tennessee. On a typical day, respondent

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1. While respondent's case was one of eighty-four separate but similar F.E.L.A. cases filed in the Tennessee state circuit court in Nashville, TN., only five of these cases, including respondent's case, remain in litigation. The other seventy-nine cases were settled shortly after petitioner's motion for rehearing to the Tennessee Supreme Court was denied in December, 1997.

and his coplaintiffs would use anywhere from three to thirty gallons of solvents in performing their work and duties for petitioner. The use of the solvents caused respondent and his coplaintiffs to become dizzy, nauseous, and lightheaded. The exposure levels were so intense that employees regularly had to leave the building to get fresh air. On numerous occasions, respondent and his coemployees were exposed to the extent that they had to be physically carried out of the shop or assisted from the building to get fresh air.

Respondent's exposure to the solvents was aggravated by the fact that even if he was not using the solvent himself, he would be exposed to solvents that were being used by fellow workers. For example, in the maintenance and repair of a locomotive engine, some of the work must be performed in a pit below ground underneath the engine. The work in the pit would be performed while other employees worked at wheel level and still other employees worked on the upper levels of the engine. The workers in the pit would be exposed not merely to solvents that they were using but also to an accumulation of solvents being used by workers at the two higher levels. Solvent exposure was further aggravated by the fact that ventilation in the shop was grossly inadequate. The shop was originally designed with approximately thirty to forty industrial fans located in the roof of the building. Through lack of maintenance, most of the fans were nonoperational most of the time. Indeed, the lack of ventilation or regular circulation of air was so extreme that at times the solvent fumes and diesel smoke in the shop reduced visibility to a mere ten to twenty feet.

By the late 1980's and early 1990's, many workers in the shop began to experience significant cognitive difficulties. A large number of workers began to experience symptoms of memory loss, concentration difficulties, depression, and sudden and unexplained outbursts of emotion. When the employees

realized that these problems were being experienced by many employees throughout the shops, they sought medical attention. A large number of workers from petitioner CSXT's Nashville shops were evaluated at the St. Lawrence Work and Health Institute in Lansing, Michigan. This facility is an occupational medicine clinic with extensive expertise in the evaluation of workers who have been exposed to toxic chemicals. Respondent and the four other plaintiffs who remain in this case have all been found to be suffering from chronic, solvent-induced, toxic encephalopathy, an organic brain injury secondary to exposure to solvents in the CSXT shops.

B. Prior History

Petitioner filed its original motion *in limine* to preclude respondent's scientific and medical experts from testifying on May 2, 1995. The trial court conducted a four day hearing wherein all parties could present testimony, either live or by deposition, exhibits and briefs. Petitioner marshalled a cadre of scientists in support of its contention that respondent's scientific and medical evidence could not survive scrutiny under the stringent rules of admissibility found in the Tennessee Rules of Evidence. Following the hearing and arguments of counsel, the trial court entered an order on October 3, 1995, denying petitioner's motion *in limine*. On January 20, 1996, the Tennessee Court of Appeals, Middle Section at Nashville, denied petitioner's application for interlocutory appeal. Petitioner then pursued a discretionary interlocutory appeal to the Tennessee Supreme Court. In its appeal, petitioner asked the Tennessee Supreme Court to reverse the trial judge and to hold that, under Tennessee law, respondent's scientific and medical evidence was inadmissible. Nowhere in its appeal to the Tennessee Supreme Court did petitioner argue or even suggest the federal question that it now seeks to have reviewed by this Court. On September 27, 1997, the Tennessee Supreme Court affirmed the decision

of the trial judge denying petitioner's motion *in limine*. A petition for rehearing was denied on December 8, 1997, and once again petitioner failed to raise the federal question that it now raises in its petition.

REASONS FOR DENYING THE WRIT

I.

FAILURE TO COMPLY WITH FINAL JUDGMENT RULE.

Petitioner has alleged an underlying federal question in order to invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a). (Pet. 2). As this Court noted in *Jefferson v. City of Tarrant, Ala.*, __U.S. __, 118 S. Ct. 481, 485 (1997), this Court's authority to review federal question decisions made by state courts is limited to only those cases in which the state's judgment is final. In *Jefferson*, this Court further explained what has come to be known as a "firm final judgment rule." The Court stated:

> To be reviewable by this Court, a state court judgment must be final "in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court."

Jefferson, __U.S. at __, 118 S. Ct. at 485-86, quoting *Market Street R.R. Co. v. Railroad Comm'n of Calif.*, 324 U.S. 548, 551 (1945).

In this case, the Tennessee Supreme Court's decision was not a "final judgment." It was an avowedly interlocutory appeal.

The decision arose out of a motion *in limine* that petitioner filed in the state trial court seeking to preclude respondent's medical and scientific experts from giving testimony in the case. In its preliminary trial motion, petitioner sought an order from the trial court denying respondent any opportunity to prove a causal nexus between long-term chronic exposure to industrial solvents and toxic encephalopathy or brain damage. After a four day evidentiary hearing conducted by the trial judge, the trial court denied petitioner's motion. (Pet. 48a-50a). On appeal to the Tennessee Supreme Court, far from terminating the litigation, the court answered but a single certified question, namely, whether the trial court abused its discretion in admitting into evidence the scientific evidence proffered by respondent. (Pet. 19a). The court affirmed the trial court's order denying petitioner's motion *in limine* and remanded the case to the trial court for further proceedings. (Pet. 19a). In all relevant respects, this case is identical to *Jefferson v. City of Tarrant, Ala.*, __ U.S. __, 118 S. Ct. 481 (1997) where this Court dismissed the Writ of Certiorari for want of jurisdiction. *See also O'Dell v. Espinoza,* 456 U.S. 430 (1982) (*per curiam*) (holding that "because the Colorado Supreme Court remanded this case for trial, its decision is not final 'as an effective determination of the litigation.' "). (citation omitted).

This case does not fit within any of the limited set of situations in which this Court has found finality as to a federal issue despite the ordering of further proceedings in the lower state courts. In its petition, as this Court found in *Jefferson, supra,* petitioner is seeking review by this Court when the Supreme Court of Tennessee has resolved one, but not all, of the issues in the underlying litigation. This Court's jurisdiction, therefore, "founders on the rule that a state court decision is not final unless and until it has effectively determined the entire litigation." *Jefferson,* __ U.S. __118 S. Ct. at 487. Because the Tennessee Supreme Court has not yet rendered a final judgment,

this Court lacks jurisdiction to review that decision on petitioner's claim of error.

II.

PETITIONER FAILED TO RAISE IN THE PROCEEDINGS BELOW THE QUESTION PRESENTED IN THE PETITION.

In addition to the 28 U.S.C. § 1257(a) jurisdictional defect in the petition, the petition fails because it raises for the first time a federal question that was not passed on in the proceedings below. The sole Question Presented in the petition is whether the Tennessee Supreme Court erred by failing to apply the federal standards for the admissibility of scientific evidence embodied in this Court's decision in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), in the context of a case arising under the Federal Employers' Liability Act. But the Tennessee Supreme Court was not presented with, nor did it decide, this question on interlocutory appeal. Moreover, the facts of record in this case do not support a determination of that question by this Court.

The question which petitioner now puts to this Court can not be extracted from the opinion below. In the last section of its opinion, the Tennessee Supreme Court merely held that the trial court judge, in denying petitioner's evidentiary motion *in limine*, "correctly foresaw the trend away from *Frye* and also used the factors set forth in *Daubert* as a framework for analysis." (Pet. 18a-19a). Agreeing with the trial court's finding that the scientific evidence that petitioner was seeking to exclude would substantially assist the jury to understand the evidence and to determine a fact in issue, the Tennessee Supreme Court applied both the federal *Daubert* analysis together with the stringent

requirements of Tennessee Rules of Evidence 702 and 703[2]. The court held that the scientific evidence proffered by respondent satisfied both the requirements of Tennessee law as well as the exigencies of the *Daubert* framework. (Pet. 19 a). Because the evidence was found to be admissible under both the Tennessee Rules of Evidence and this Court's guidelines set forth in *Daubert,* the Tennessee Supreme Court did not reach the question of whether the federal rule embodied in *Daubert* should be applied to an action arising under the F.E.L.A. in derogation of any state law analysis.

The facts of record, moreover, do not permit a formulation of the resolution of the Question Presented by petitioner. To begin with, the questions that petitioner sought to have reviewed by the Tennessee Supreme Court fell far short of raising the federal question that petitioner has now raised before this Court. In fact, in argument before the Tennessee Supreme Court, petitioner excoriated the trial court for adopting a federal analysis

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2. Tenn. R. Evid. 702 reads as follows: If scientific, technical, or other specialized knowledge will ***substantially*** assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.

Tenn. R. Evid. 703 reads as follows: The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. ***The court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness.***

These state rules of evidence are identical to Fed. R. Evid. 702 and 703 with the exception of the words in italics.

that it now alleges is "vital" and "outcome determinative." (Pet. 6).[3] In its introduction to its argument to the Supreme Court of Tennessee, petitioner urged the court to "recognize Tennessee's **unique and higher standard** upon which scientific testimony must be gauged." Initial Brief of Appellant in No. 01-S-01-9605-CV-00095 (Sup. Ct. Tenn.) p. 22. (Emphasis supplied). The crux of petitioner's argument to the Tennessee Supreme Court was that the Tennessee Rules of Evidence allegedly placed more stringent requirements upon parties seeking to have scientific evidence admitted at trial than do the federal rules. Consequently, in its interlocutory appeal to the Tennessee Supreme Court, petitioner urged the court to maintain "fidelity to the strict requirements contained in the language of the [Tennessee] rules and the adoption of a reasonable and tested standard for causation." Initial Brief of Appellant in No. 01-S-01-9605-CV-00095 (Sup. Ct. Tenn) p. 23.

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3. In its initial brief to the Tennessee Supreme Court, petitioner argued to the court that the trial court had erred in finding Respondent's scientific evidence admissible because it had failed to adopt or apply exclusively the "unique" Tennessee State Rules of Evidence.

> Unfortunately, the Trial Court chose to apply a *federal* case law analysis based on the Federal Rules without adequately adjusting its application to the differences between those rules and the Tennessee Rules.

Initial Brief of Appellant in No. 01-S-01-9605-CV-00095 (Sup. Ct. Tenn.) p. 27.

III.

THE RECORD IN THIS CASE, INCLUDING PETITIONER'S ARGUMENT BELOW, IS BARREN OF ANY INDICATION THAT PETITIONER AT ANY TIME RAISED THE FEDERAL QUESTION THAT IT IS NOW SEEKING FOR THE FIRST TIME TO BE REVIEWED BY THIS COURT.

While petitioner's appeal to the Tennessee Supreme Court argued strenuously in favor of a strict application of the Tennessee Rules of Evidence, petitioner now seeks review of this Court by fashioning a federal question that not only was not raised in the proceedings below but was not passed upon by the Tennessee Supreme Court.[4] This attempt to create a federal question ***ex nihilo*** for this Court's review leaves this Court without jurisdiction pursuant to 28 U.S.C. § 1257 to decide the issue. "[O]rdinarily this Court does not decide questions not raised or involved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *United States v. Mendenhall*, 446 U.S. 544, 551-552 n.5 (1980); *Delta Airlines v. August*, 450 U.S. 346, 362 (1981).

In this case, the want of proper presentation in the state court is fatal to petitioner's request that its petition be reviewed by this Court. *See Street v. New York*, 394 U.S. 576, 582 (1969). Nor was the fatal deficiency in its petition cured *sua sponte* in the court below. The record is silent regarding the federal issue itself and whether the Tennessee Supreme Court expressly considered and determined said issue. Petitioner simply did not ask, nor did the Tennessee Supreme Court attempt to answer,

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4. Because respondent has made reference to petitioner's arguments below, respondent has lodged a copy of petitioner's Initial Brief of Appellant in No. 01-S-01-9605-CV-00095 (Sup. Ct. Tenn.) with the clerk's office of this Court.

whether federal law, and federal law only, controls the gatekeeping discretion of the trial judge when reviewing the admissibility of expert scientific evidence within the context of a case brought under the Federal Employers' Liability Act. It is well settled that if the state court does no more than discuss the interpretation of state rules, without considering such interpretation in light of a federal question properly presented to it, the Supreme Court can not consider the federal issues. *Beck v. Washington*, 369 U.S. 541, 549-50 (1962).

CONCLUSION

Petitioner has asked this Court to review an interlocutory decision that is not final in a case where the federal question presented for review was neither raised in the proceedings below nor passed on by Tennessee's court of last resort. For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A — INITIAL BRIEF OF APPELLANT IN No. 01-S-01-9605-CV-00095 (Sup. Ct. Tenn.) DATED SEPTEMBER 14, 1996

(Omitted here but printed separately as Lodging Appendix.)